BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the trial court has not been reported. The opinion of the circuit court of appeals is reported in the Federal Reporter, Advanced Sheet, 115 S. W. 2d 704.

II.

(a) The date of the judgment of the court of civil appeals from which petition for certiorari is filed was December 3, 1940.

(b) This petition for certiorari was filed on the 27th day of January, 1941.

(c) The statutory provision which sustains jurisdiction of this court in Judicial Code, Section 240, as amended (Sec. 347, Tit. 28, U. S. C. A.). Jurisdiction of this petition for certiorari is also found in Rule 38 (5), Supreme Court Rules, 1939.

(d) The United States Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions. The specific conflicts have been pointed out in the petition for certiorari and will be further treated in argument under the questions before this court for decision.

III.

This petition for certiorari arises out of the United States Circuit Court of Appeals for the Fifth Circuit affirming, on the 3rd day of December, 1940 (R. p. 82), the judgment of the District Court of the United States for the Northern District of Texas, Lubbock Division, in

cause styled *J. R. Cone* v. *Oda Parish et al.*, No. 39, Civil Action, which judgment was rendered on the 10th day of April, 1940 (R. p. 8 0).

Reid B. Scott and Aaron Cohen, both defendants in the above cause, filed cross action against each other for title to one-half the mineral under the S. E. Quarter of Section 897, Block "D," Yoakum County, Texas. Aaron Cohen recovered judgment in the trial court against petitioner to this one-half mineral interest solely on the doctrine of estoppel by deed, or after-acquired title.

Petitioner filed a motion for rehearing in the Fifth Circuit Court of Appeals, assigning as error the identical questions here presented.

This controversy involves the unique Texas real property law, unique as a combination of the civil, statutory, and common-law systems. This controversy involves oil and gas law, of which the State of Texas has also developed a unique jurisprudence.

The evidence supporting the after-acquired title of respondent is all documentary anf a listing thereof summarizing the questions arising in this suit. The list is in chronological order of happening:

1. February 6, 1926, deed of trust lien from S. A. (Gus) Jones to Frank D. Howell, for the benefit of B. H. and Royce S. Oxford, filed for record in the county clerk's office of Yoakum County, Texas, on February 17, 1926 (R. p. 11-13).

2. September 1, 1926, mineral conveyance, S. A. (Gus) Jones and wife to appellee, Aaron Cohen, filed for record in the county clerk's office of Yoakum County, Texas, September 30, 1926 (R. p. 8-11). (This conveyance being the one relied upon by the appellee for his recovery in this case.)

3. January 4, 1927, trustee's deed, Frank D. Howell to Royce A. Oxford, filed for record in the county clerk's office of Yoakum County, Texas, March 12, 1927 (R. p. 5-7).

4. January 4, 1927, deed, Royce A. Oxford and wife, to S. A. Jones, reserving a vendor's lien to secure the balance of the unpaid purchase price, filed for record in the county clerk's office of Yoakum County, Texas, June 14, 1927 (R. p. 19-20).

5. June 8, 1927, warranty deed, S. A. Jones and wife to Tommye Jones, reserving a vendor's lien, to secure the balance of the unpaid purchase price, filed for record in the county clerk's office of Yoakum County, Texas, June 14, 1927 (R. p. 20-22).

6. September 9, 1927, release of vendor's lien by Royce A. Oxford, releasing the vendor's lien retained in the deed from Royce A. Oxford and wife to S. A. Jones (R. p. 24).

7. January 12, 1929, deed of trust, Tommye Jones to C. A. Williams for the benefit of Reid B. Scott, filed for record in the county clerk's office of Yoakum County, Texas, on February 2, 1929 (R. p. 25-31).

8. May 6, 1930, trustee's deed, C. A. Williams to Reid B. Scott, filed for record in the county clerk's office of Yoakum County, Texas, May 8, 1930 (R. p. 31-44).

Each of the above conveyances concern the southeast quarter of the land in controversy. Petitioner has been awarded the surface of this southeast quarter and seeks to establish title to an undivided one-half mineral interest therein. The approximate value of this mineral interest is $75,000.

The mineral conveyance, S. A. (Gus) Jones to Aaron Cohen, respondent herein (R. p. 8), is a standard form contract denominated in Texas as a "perpetual royalty deed." However, this mineral conveyance (copied in the brief as pages 15 to 17, Appendix) is expressly made subject to an oil and gas lease. The name of the person to whom the oil and gas lease is made, and a definite reference to the book wherein such oil and gas lease was recorded, is not made in this mineral conveyance.

IV.

FIRST SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Fifth Circuit erred in holding that the mineral conveyance conveyed a one-half interest in the land in controversy by the application of the doctrine of estoppel by deed (after-acquired title) because the courts of Texas have construed such a mineral conveyance to convey interest in a possibility of reverter, an interest in the delay rentals, if any, and an interest in the royalties, if any (Question No. 1 in Petition for Certiorari—Assignment of Error II, Appellant's Motion for Rehearing, R. p. 25).

Summary.

Petitioner acquired his title by a regular chain of conveyance as set out in petition for certiorari, Section I. Respondent claimed a one-half mineral interest by virtue of after-acquired title. Respondent received his alleged interest from Gus Jones by the mineral conveyance (R. p. 8, Appendix p. 15) heretofore spoken of. Briefly, the mineral conveyance granted Aaron Cohen a one-half mineral interest subject to the terms of an oil and gas lease executed in favor of.....(the name of this lessor is omitted), and further granted a one-half interest in future mineral rents, royalties, and bonuses. This mineral conveyance was destroyed by the foreclosure of a preexisting deed of trust lien and sale thereunder (R. p. 15). Subsequently, Gus Jones reacquired a right to this title by repurchasing the premises from the deed of trust sale purchaser who retained title and a vendor's lien (R. p. 17).

Argument.

The United States Court of Appeals for the Fifth Circuit granted respondent a one-half mineral interest because Gus Jones subsequently acquired the property

lost by him at the foreclosure sale (R. p. 15). This was affirmative error because the Texas courts have construed the exact form of mineral conveyance taken by Aaron Cohen to grant only the one-half interest in the possibility of reverter, the one-half interest in the royalties retained under the oil and gas lease, if any, and the one-half interest in the rents accruing under the terms of the oil and gas lease, if any. *Hoffman* v. *Magnolia Petroleum Co.*, 273 S. W. 828; *O'Fiel* v. *Brooks*, 98 S. W. 2d 266 (C. C. A.); *Tipps et al.* v. *Bodine*, 101 S. W. 2d 1076 (C. C. A.); *Olvey et al.* v. *Jones et al.*, 95 S. W. 980 (C. C. A.). This construction has been placed on this same instrument even though the name of the oil and gas lessee was blank as in the present case at bar. *O'Fiel* v. *Brooks*, 98 S. W. 2d 266 (C. C. A.).

Progressing, it becomes apparent, then, that in order for the circuit court to have rendered a judgment for respondent, it must have before it the oil and gas lease to which the mineral conveyance was subject. This oil and gas lease was not in the record of the trial court, nor was it before the circuit court of appeals. Therefore, no judgment could have been rendered for respondent. Under the Hoffman case, the respondent's interest in the mineral is a possibility of reverter. This is not such an estate as will permit the respondent to recover title and possession of the mineral. *Davis et al.* v. *Skipper et al.*, 83 S. W. 2d 318 (Com. App.).

Bear in mind, in considering the judgment of the circuit court, that an after-acquired title may not be engrafted upon the legal title by mere surmise. *Cities Service Oil Co.* v. *Dunlap*, 88 L. Ed., p. 196. The terms of the conveyance upon which after-acquired title is founded must, with certainty, describe the estate which passed by operation of law. *Linney* v. *Wood*, 17 S. W. 244 (Tex. S. Ct.); *Spofford* v. *Hobbs*, 29 Me. 148; *Newton* v. *Easterwood*, 154 S. W. 646 (C. C. A.); *Gilmer* v. *Poindexter*, 13 L. Ed. 411, 10 How. 257.

It is well also to bear in mind, in considering the error made by the circuit court in its decision, that the court rendered an absolute one-half mineral fee to respondent. Since the terms of the oil and gas lease are essential in determining the fee, and since an oil and gas lease creates a determinable fee only (*Sheffield* v. *Hogg*, 77 S. W. 2d 1021, (Tex. S. Ct.)), the doctrine of after-acquired title was further ineffective because the warranty made in the mineral conveyance which allowed the invocation of the after-acquired title doctrine warranted only an unspecified, determinable fee. A warranty of this nature, under Texas decision, is not sufficient to support the doctrine of estoppel by deed, and the warranty in the mineral conveyance at bar warranted, in *Hoffman* v. *Magnolia Petroleum Co., supra,* only a possibility of reverter. *Edward G. Harnick* v. *W. A. Patrick et al.*, 119 S. W. 156, 30 L. Ed. 396, 7 S. Ct. 147; *Gilmer* v. *Poindexter*, 13 L. Ed. 411, 10 How. 257; *Campbell* v. *Jones*, 230 S. W. 710 (C. C. A.).

V.

SECOND SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Fifth Circuit erred in rendering judgment for respondent for one-half of the minerals because the mineral conveyance by which respondent acquired title was insufficient under the statute of frauds of Texas (Question No. 2 in Section III, Petition for Certiorari—Assignment of Error III, Appellant's Motion for Rehearing, R. p. 96).

Summary.

The summary in specification of error No. 1, Section IV, this brief, is adopted as a summary of the facts applicable to this second specification.

Argument.

The point raised by this specification of error is that the mineral conveyance was, under the terms of *Hoffman* v. *Magnolia Petroleum Company, supra,* entirely dependent upon the terms of the oil and gas lease which was not described. Since the oil and gas lease was the subject matter of the mineral conveyance, the failure to describe the lease resulted in a deficient description of the subject matter of the conveyance. Under the Texas statutes of frauds (which is set out in Appendix p. 17) as in the statute of frauds prevalent throughout the common-law jurisdiction, the failure to describe the subject matter results in the conveyance being ineffective, void. *Smith* v. *Griffin,* 116 S. W. 1064 (Com. App.); *Taubert* v. *Earl,* 133 S. W. 2d 145 (C. C. A.); *Fagg* v. *Texas Co. et al.,* 57 S. W. 2d 87 (Tex. Com. App.); *Sneed* v. *Lester,* 76 S. W. 2d 802 (_____).

VI.

THIRD SPECIFICATION OF ERROR.

The United States Circuit Court of Appeals for the Fifth Circuit erred in rendering judgment for respondent, awarding him one-half of the minerals under the land in controversy on the after-acquired title theory because respondent's grantor, subsequent to the foreclosure, acquired only a possessory right and no title which could feed the warranty in the mineral conveyance (Question No. 3, Section III, Petition for Certiorari—Assignment of Error V, Appellant's Motion for Rehearing, R. p. 98).

Summary.

Before executing the mineral conveyance in question, Gus Jones had executed a deed of trust (R. p. 11) which was foreclosed and the land sold to Royce Oxford

(R. p. 15). This foreclosure admittedly cut off any interest held by respondent under the mineral conveyance. After the foreclosure, Royce Oxford reconveyed a portion of the lands which he had bought at the trustee's sale—all of the lands involved in this controversy—to Gus Jones, the immediate grantor of respondent (R. p. 17). However, in conveying to Gus Jones, Oxford retained a vendor's lien and its appurtenant title (R. p. 17).

Argument.

Under settled Texas law, Royce Oxford, by retaining the vendor's lien and its appurtenant title, retained the title to the properties in controversy. Gus Jones, buying from Oxford, subject to the vendor's lien, acquired only a possessory right, coupled with the right to acquire title upon his payment of the vendor's lien notes. Gus Jones acquired an interest which he could abandon, which he could convey by parol. *Johnson* v. *Smith,* 280 S. W. 158 (S. Ct.); *Waukee* v. *Hill,* 99 S. W. 2d 1047. Certainly, this interest which could be abandoned, and which could be conveyed by word of mouth, was no such interest in realty as would feed the warranty in the original mineral conveyance to respondent and as would allow the operation of an after-acquired title.

VII.

CONCLUSION.

Summarizing the whole of the brief, then, the courts below erred in granting respondent an after-acquired title because, first, the form of the mineral conveyance made necessary a description of the oil and gas lease which was not shown at trial, thus rendering the mineral conveyance too indefinite as to the interest warranted to allow the invocation of after-acquired title; second, the mineral conveyance, dependent upon the oil and gas lease, the de-

scription of which was blank, was ineffective as a valid conveyance of real estate; and, third, Gus Jones, respondent's grantor, never acquired a title to real estate which would feed the after-acquired title invoked under the warranty in the mineral conveyance.

It is, therefore, respectfully submitted, that the circuit court committed an error in deciding an important question of local law and deciding such question in conflict with local decisions, and that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing the decisions of the lower courts.

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